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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MERCY-MEMORIAL HOSPITAL CORPORATION and
RICHARD HILTZ,
Petitioners,

v.

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A UNION'S ALLEGATIONS THAT AN EMPLOYER RENDERED LEGAL ASSISTANCE TO AN EMPLOYEE CONSTITUTES AN UNLAWFUL PAYMENT UNDER THE LABOR-MANAGEMENT RELATIONS ACT ("LMRA"), 29 U.S.C. § 186, AND THEREFORE ESTABLISHES AN INDEPENDENT FEDERAL REMEDY SUFFICIENT TO CREATE AN EXCEPTION TO THE DOCTRINE OF PREEMPTION ARISING FROM THE NLRB'S PRIMARY JURISDICTION OVER UNFAIR LABOR PRACTICE?

II.

WHETHER A CIVIL CLAIM FOR TREBLE DAMAGES UNDER THE RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), 18 U.S.C. § 1961, REQUIRES THAT A PLAINTIFF PLEAD ALLEGATIONS OF A RICO VIOLATION WITH THE SPECIFICITY DEMANDED IN FED. R. CIV. P. 9(b) TO DEMONSTRATE A "PATTERN OF RACKETEERING ACTIVITY", AND, IF NOT, WHETHER A RICO PLAINTIFF MUST ALLEGE MORE THAN ONE ON-GOING "SCHEME" TO FULFILL RICO'S PATTERN OF RACKETEERING ACTIVITY REQUIREMENT?

LIST OF PARTIES TO THE PROCEEDINGS PURSUANT TO SUP. CT. R. 21.1(b)

Mercy-Memorial Hospital Corporation

Richard Hiltz

Hospital Employees' Division of Local 79, Service Employees' International Union, AFL-CIO

Charlotte Baum

Ninfa Beckner

Stephen McHenry

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Mercy-Memorial Hospital Corporation and Richard Hiltz, ("Petitioners" or "Hospital") respectfully pray that a Writ of Certiorari issue to review the judgment and orders of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit which appears in Appendix A, *infra*, is reported at 862 F.2d 606 (6th Cir. 1988). The opinion and order of the United States District Court Eastern District of Michigan Southern Division granting Petitioners' Motion for Summary Judgment which appears in Appendix B, *infra*, is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on December 6, 1988, reversing the District Court's opinion and order granting Petitioners' Motion for Summary Judgment dated December 11, 1987. This Petition for Certiorari was timely filed on March 6, 1989. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions for this Petition for Certiorari are: Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186; Section 8 of the National Labor Relations Act, 29 U.S.C. § 157, 158; and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962 and 1964. The text of these provisions are set forth in their entirety at Appendix C pursuant to Sup. Ct. R. 21.1(f).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under the National Labor Relations Act, 29 U.S.C. §§ 158, 159 (NLRA); the Labor-Management Relations Act of 1947, 29 U.S.C. § 186 (LMRA); the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 *et seq.* (RICO); and under 28 U.S.C. § 1331.

Petitioner Mercy-Memorial Hospital is a privately owned, non-profit hospital located in Monroe, Michigan. Petitioner Richard Hiltz is the administrator of the Hospital.[1] The Respondents are a labor union, Hospital Division of Local 79 of the Service Employees International Union, AFL-CIO, and some of its members.[2] Local 79 is the bargaining representative of the employees working at the Hospital. The litigation in this case is based on alleged assistance from the Hospital to two employees, both of whom filed decertification petitions against the Union.

In September, 1985, Susan Dorsey, an employee of the Hospital filed her decertification petition. On June 11, 1986, the Regional Director of the National Labor Relations Board (NLRB) of Detroit dismissed the decertification petition filed by Ms. Dorsey. Both the Hospital and Ms. Dorsey filed briefs with the Board requesting review of the dismissal of the petition.

On July 3, 1985, the Union filed a complaint with the NLRB alleging that the Hospital's legal counsel violated section 8(a)(1) of the NLRA by providing assistance to Ms. Dorsey in the filing of her appeal brief. The NLRB investigated the complaint and on October 22, 1986, the Regional Director concluded that the section 8(a)(1) charge should not be brought against the Hospital and its attorneys because they did not improperly interfere with or restrain the employees in the free exercise of their labor

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[1] Hereafter both Petitioners will be referred to as "Hospital" or "Petitioners".

[2] Hereafter all Respondents will be referred to as "the Union", "Local 79" or "Respondents".

rights.[3] Specifically, the opinion concluded that any assistance in brief writing does not ultimately interfere with the employees' labor rights. The dismissal was affirmed by the Board's office of appeals on December 23, 1986.

On December 4, 1986, the Union filed a four count complaint[4] in the federal district court based on the same facts found in its complaint with the NLRB. Count I alleged that the Hospital violated section 302(a)(3) of the LMRA, 29 U.S.C. § 186(a)(3); Counts II and III alleged violations of RICO, 18 U.S.C. § 1961 by virtue of two separate violations of the LMRA; Count IV alleged tortious interference with economic relations, but is no longer a part of the case.

As the basis for its two section 302 violations,[5] the Union first alleged that the Hospital, "on information and belief, provided financial assistance and/or other things of value to Nolan Smallwood in support of his efforts to decertify Local 79." Respondents' Complaint, paragraph 34. Nolan Smallwood, also an employee at the Hospital, filed his petition for decertification in January, 1983 some two years before Susan Dorsey filed hers. No specific allegations of brief writing or other assistance are found in the Complaint in relation to Smallwood's decertification attempt.[6] The alleged RICO predicate act is found at paragraph 49 where the Union asserts that the Hospital assisted Ms. Dorsey in the writing of her legal brief. There are no other allegations concerning violations of section 302 in the Complaint pertinent to Respondents' lawsuit.

A motion for summary judgment was brought by the Petitioners which was ultimately granted by the district court on

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[3] The opinion of the Regional Director appears in Appendix D, *infra*.

[4] A copy of the Complaint appears in Appendix E, *infra*.

[5] Under the requirements of RICO, the plaintiff must plead two predicate acts in order to properly demonstrate a pattern of racketeering activity. 18 U.S.C § 1961(5).

[6] Smallwood's decertification drive was, of course, unsuccessful.

December 11, 1987. The Petitioners argued that Respondents' section 302 allegations were preempted by the jurisdiction of the NLRB. Also, the Petitioners argued that Respondents had failed to properly plead a RICO violation. The Union appealed to the United States Court of Appeals for the Sixth Circuit and that court reversed the district court's dismissal on December 6, 1988. Both opinions appear as appendices, *infra*.

REASONS FOR GRANTING THE WRIT

I. A UNION'S ALLEGATIONS THAT AN EMPLOYER RENDERED LEGAL ASSISTANCE TO AN EMPLOYEE DOES NOT CONSTITUTE AN UNLAWFUL PAYMENT UNDER THE LABOR-MANAGEMENT RELATIONS ACT 29 U.S.C. § 186 AND THEREFORE FAILS TO ESTABLISH AN INDEPENDENT FEDERAL REMEDY SUFFICIENT TO CREATE AN EXCEPTION TO THE DOCTRINE OF PREEMPTION ARISING FROM THE NATIONAL LABOR RELATION BOARD'S PRIMARY JURISDICTION OVER UNFAIR LABOR PRACTICES.

As set forth above, the federal district court for the Eastern District of Michigan dismissed the Respondents' claims under section 302 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 186, pursuant to Fed. R. Civ. P. 12(b)(1). Specifically, the district court held that under *San Diego Building Trades Counsel* v. *Garmon,* 359 U.S. 236 (1958), Respondents' section 302 claims were preempted by the primary jurisdiction of the National Labor Relations Board ("NLRB") over unfair labor practices. Implicit in the district court's decision was the court's recognition that the Respondents' claims were more akin to unfair labor practices under section 8 of the National Labor Relations Act ("NLRA") than they were to a proper section 302 claim.

On appeal the United States Court of Appeals for the Sixth Circuit applied a similar analysis, but achieved a different result. The appellate court first acknowledged that under the *Garmon* decision the NLRB does indeed have primary jurisdiction over activities which are arguable subject to section 7 or section 8 of the NLRA. *Hospital Employees' Division of Local 79* v. *Mercy-Memorial Hospital,* 862 F.2d 606, 608 (1988). Furthermore, the court recognized that "when an activity is arguably subject to section 7 or section 8 of the NLRA, the States as well as the federal court, must defer to the exclusive competence of the National Labor Relations Board. . ." *Id.*, at 608. Nonetheless, the

court noted that an exception to the *Garmon* preemption rule exists where Congress has established some other independent right. The court then went on to summarily decide that section 302, as an "independent liability-creating statute" provides just such an independent federal right. Consequently, the Sixth Circuit held that since, in that court's view, the Union's section 302 claims fit within the exception to the *Garmon* preemption doctrine, the district court had erred in dismissing the Union's section 302 claims.

While there is some support for the Sixth Circuit proposition that the existence of an independent federal right creates an exception to the application of *Garmon* preemption,[7] the Circuit court was nevertheless incorrect in determining that the Union's section 302 claims fit within that exception. The inherent flaw in the Circuit court's analysis is simply that section 302 of the LMRA was not designed to provide a remedy for the Union's complaints in this matter and is, therefore, inapplicable.

Instead, the applicable provision is section 8(a) of the NLRA, 29 U.S.C. § 158(a), which reads:

> [it] shall be unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

29 U.S.C. § 157 provides, in part, that:

> [employees] shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

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[7] In their brief before the Sixth Circuit, Petitioners recognized the possible existence of the "independent federal right" exception as set forth in *Connell Construction Co., Inc.* v. *Plumbers & Steam Fitters Local Union* 100, 421 U.S. 616, 636, fn. 17 (1975), yet rejected the possibility that section 302 may fall within such an exception because such a construction of section 302 was incompatible with the established scheme of national labor law administered by the NLRB.

It is manifest that this statute is designed to deal with precisely the type of situation where an employer has allegedly assisted in filing a decertification petition.

In comparison, section 302 speaks in rather vague and broad terms. A brief inspection of 302 reveals a statute which prohibits payment of anything of value by employers to employee representatives;[8] provides certain exceptions for jointly administered trust funds;[9] provides criminal sanctions of a $10,000.00 fine or one year imprisonment for violation;[10] and provides federal district court jurisdiction to enjoin violations of the section.[11] While such a cursory look at the statute might seem to indicate its applicability to the activity alleged in the case at bar, an in depth analysis of the section's legislative history, as well as the case law applying the statute, makes it abundantly clear that section 302 does not encompass the Union's allegations.

Section 302 originated as the Byrd Amendment to the Case bill, which was a 1946 Congressional effort to revise the NLRA. The Case bill, however, fell to President Truman's veto that same year.[12] A year later, during the development of the Taft-Hartley Act, Senators Taft and Ball offered section 302 as an amendment from the floor to reinsert "in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session."[13] Prior to the adoption of the section 302 amendment, the Taft-Hartley Act contained no reference to payments by an employer other than those references found in section 8(a)(2) of the original

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[8] 29 U.S.C. § 186(a), (b).

[9] 29 U.S.C. § 186(c).

[10] 29 U.S.C. § 186(d).

[11] 29 U.S.C. § 186(e).

[12] 92 Cong. Rec 6674-6678 (1946).

[13] S. Rep. No. 105, 80th Cong.; 1st Sess., p. 52 (1947).

NLRA.[14] Due to its prior approval as part of the Case bill, section 302 was adopted as part of the Taft-Hartley Act with only a minor amount of discussion. As a result, a good share of the legislative intent behind section 302 can be found in the debates on the Case bill of 1946.

In *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1958), this Court sifted through the legislative history on the Case bill and the Taft-Hartley Act to define the purposes of section 302. The Court found that:

> [t]hose members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the

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[14] The rather peculiar legislative history of section 302 is set forth in detail in *Arroyo* v. *United States*, 359 U.S. 419, 425, fn. 6 (1958):

> Section 302 has its origin in an amendment to the Case bill, H. R. 4908, 79th Cong., 2d Sess., proposed by Senator Byrd, 92 Cong. Rec. 4809, which prohibited payment by an employer, or receipt by a representative, of any money or other thing of value unless the payment was for wages or for union dues withheld by the employer under a checkoff agreement. After several modifications, including one substantially similar to subsection(c)(5) which was proposed by Senators Taft and Ball, the amendment was agreed to by the Senate, 92 Cong. Rec. 5521-5522, and the Case bill passed. 92 Cong. Rec. 5739. The House accepted the Senate amendments, 92 Cong. Rec. 5956, but the President vetoed the bill, 92 Cong. Rec. 6674-6678, and it failed of passage over his veto. 92 Cong. Rec. 6678.
>
> In the Eightieth Congress the Senate Committee on Labor and Public Welfare reported out an original bill, S. 1126, containing no reference to payments by an employer to a representative other than that which had been contained in section 8(2) of the Wagner Act. A minority of the Committee, including Senators Taft and Ball, filed their "Supplemental Views" in which they stated their intention to offer from the floor "an amendment reinserting in the bill a provision regarding so-called welfare funds to the section in this Case bill approved by the Senate at the last session." S. Rep. No. 105, 80th Cong., 1st Sess., p. 52. The amendment was adopted by the Senate, 93 Cong. Rec. 4574, accepted by the Conference Committee, H.R. Rep. No. 510, 80th Cong., 1st Sess., pp. 24-25, 67, and enacted as section 302 of the Labor Management Relations Act.

possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control.

As the Court further recognized, the prevention of welfare fund abuse by union officials was unquestionably the central concern of the amendment's supporters. *Arroyo* v. *United States*, 359 U.S. at 426, citing *United States* v. *Ryan*, 350 U. S. 299 (1955). This concern was precipitated by the United Mine Workers 1946 demand that mine owners contribute ten cents to a union dominated welfare fund for every ton of coal that the union mined. Congress was understandably concerned that such demands constituted an unlawful tax which could be used to extort a type of tribute from employers and which would go towards funding union "war chests".[15]

It was in that setting which Congress also addressed the problems of bribery and extortion in the collective bargaining process. Senator Taft, one of the primary drafters of the Taft-Hartley Act, noted that section 302 of the bill would first provide that,

> 'it shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees.'
>
> That is, it may be said, in a case of extortion or a case where the union representative is shaking down the employer. 93 Cong. Rec. 4746 (1947).

Furthermore, Senator Byrd asserted that his amendment to the Case bill would

> . . .prevent an employer from paying a royalty to the representative of a Union. He would be clearly liable under the provisions of this amendment, if he paid a royalty or other money to the representative of a labor union, the purpose of which was to bribe that representative. 92 Cong. Rec. 4893 (1946).

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[15] 92 Cong. Rec. 4891-4912 (1946).

While it is patently obvious that the evils which Congress sought to address via section 302 are not related to the Union's allegations in this claim, the Sixth Circuit was undaunted. Obviously recognizing the hopeless inapplicability of the "welfare fund abuse" purpose, or the "extortion by an employee" purpose, the Circuit court chose to label Petitioners' alleged actions as "bribery", despite the fact that the Union itself has never characterized its allegations as bribery.

A review of the testimony elicited during discovery in this matter reveals nothing even remotely resembling bribery. It is apparent that Susan Dorsey acted wholly on her own in filing her decertification petition. Essentially, the only allegation of Ms. Dorsey receiving anything of value in this matter is the claim that she received assistance in preparing her appellate brief *after* the NLRB had already dismissed her petition for decertification. Respondents' Complaint, para. 49. A common sense definition of bribery is "the giving of something of value in hopes of persuading the recipient to act in a certain manner." To characterize the Union's claims in this matter as allegations of bribery would result in a very distended interpretation of the crime.

Furthermore, the prosecution of a bribery complaint under a statute providing only for civil injunctive relief is an incredible contortion of this section of the LMRA. Instead, the type of union-management corruption envisioned by section 302's implicit prohibition of the acts of bribery and extortion are the concern of the Department of Justice, since these crimes inherently involve an important public interest. Furthermore, since "bribes" are not the type of acts which are foreseeable in the future, they do not properly lend themselves to remedy by injunction. Therefore, the fact that section 302 only allows for injunctive relief on the civil side presents ample evidence of Congress' intent to prosecute bribery and extortion via the criminal provisions of section 302(d). Any other construction of the section throws Congress' legislative scheme into total disarray and, indeed, allows for just the pointless type of litigation involved in this case.

Similarly, the Respondents' position that the assistance rendered to Susan Dorsey is an LMRA section 302 violation directly conflicts with Congressional intent to unify the administration of unfair labor practices under the NLRB, as well as the view of statutory interelation manifested by section 302's primary author, Senator Taft. Senator Taft's understanding of the interaction between section 302 and section 8 was revealed during the debates on the proposed amendment when members of the opposition, who supported the existence of unregulated welfare funds, were arguing against the amendment's adoption due to its broad language. These opponents of the amendment were proposing extreme situations where application of the amendment would achieve a bizarre result.[16] At that time, Senator Taft spoke up and said:

> The Senator cited the instance of a company supporting a union baseball team. I may say that that kind of action has been held by the National Labor Relations Board to be an unfair labor practice, in that it indicated that the union was dominated by the company. The Labor Relations Act itself so provides. I read from it the following language:
>
> It shall be unfair labor practice for any employer to dominate or interfere with the formation or administration of any labor organization, or contribute financial or other supports to it.
>
> * * *
>
> But so far as the general principle of refusing to permit employers to pay money directly to unions is concerned, I do not believe the proposal is much of a departure from the provisions of the present National Labor Relations Act. 92 Cong. Rec. 4899 (1946).

The obvious import of Senator Taft's comments is that th proposed amendment would not be nearly as broad as the oppos

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[16] Such as where an employer's contribution to a union employees' baseb team would be considered a crime under section 302.

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tion was asserting, because unlawful payments such as those being cited were properly within the province of an already existing statute, section 8 of the NLRA. Petitioners' position mirrors that of Senator Taft.

A more limited and feasible interpretation of section 302's enforcement provisions develops upon reviewing the cases which have applied section 302 over the last forty years. The analysis of those cases defines section 302 as generally a criminal statute enforceable under section 302(d), combined with a civil injunctive remedy for administration of those acts which fall within the stated exceptions to the proscribed activity; i.e. the establishment of certain trust funds under section 302(c). Until recently, the propriety of that interpretation of section 302 has been a matter of such common sense that only one court has ever felt compelled to address the issue directly.[17]

The assessment of section 302 as primarily a criminal statute is further buttressed by this Court's holding in *United States* v. *Ryan*, 350 U.S. 299 (1955). The *Ryan* court held that "as the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." *Id.* at 305. Furthermore, the merely collateral stature of section 302(e) is evidenced by Senator Byrd's comments in describing the enforcement provisions of his amendment.

> The penalty for a violation of the act is a fine of not more than $10,000.00 or imprisonment for not more than 6 months, or both. United States district courts are given jurisdiction to enforce the act, ***and in addition to the criminal penalty can grant injunctions***, notwithstanding any provision of any antitrust law which seeks to relieve labor. (emphasis supplied).

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[17] In *Weir* v. *Chicago Plastery Institute*, 177 F. Supp. 688, 696 (N.D. Ill. (1959), the court observed that "primary enforcement of section 302 was left to the Department of Justice, while subsection (e) was enacted primarily for the express purpose of giving employees the right to challenge the administrator of their funds in the federal courts.

The appropriateness of a limited construction of 302(e)'s grant of federal jurisdiction is adequately illustrated by the nonexistence, until recently, of any caselaw applying the available injunctive relief outside of the welfare fund scenario. Furthermore, the extraordinary number of cases which have applied 302(e) to welfare funds fact patterns is staggering.[18]

Another indication that the Sixth Circuit's construction of 302(e) may be erroneous, is the existence of an on-going conflict among the circuits regarding the breadth of a court's authority to remedy section 302 violations even within the welfare fund scenario. While the majority of circuits limit the application of 302(e) to funds which have "structural defects" as defined by the provisions of 302(e),[19] some circuits also limit the available remedy to injunctive relief which is prospective in nature.[20] Virtually all the circuits have implicitly or explicitly rejected the notion that section 302(e) provides the basis for the development of federal common law in this area.[21]

Of course, the Sixth Circuit's decision to apply 302(e) as support for an independent cause of action outside of the administration of welfare type funds creates a direct conflict among the circuits which demands resolution by this Court. Needless to say, a decision by this Court which limits the application of section 302(e) to the proper administration of welfare type funds will effectively preclude the Sixth Circuit's reliance on 302 as an

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[18] *See* Annot., 88 A.L.R. 2d 493 (1963).

[19] *See McCaffrey* v. *Rex Motor Transport*, 672 F.2d 246 (1st Cir. 1982); *de Loraine* v. *MEBA Pension Trust*, 499 F.2d 49 (2nd Cir. 1974); and *Alvares* v. *Erickson*, 514 F.2d 156 (9th Cir. 1975).

[20] *See Snider* v. *Allstate Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973); *Bowers* v. *Moreno*, 520 F.2d 843 (1st Cir. 1975); *Alvares* v. *Erickson*, 514 F.2d 156 (9th Cir. 1975); and *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3rd Cir. 1977).

[21] *See Lugo* v. *Employees Retirement Fund of the Illumination Products Industry*, 529 F.2d 251 (2nd Cir. 1976); *Blassie* v. *Kroger Co.*, 345 F.2d 58 (8th Cir. 1965); *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); and *Moses* v. *Ammond*, 162 F.Supp 866 (D.C.N.Y. 1958).

"independent federal remedy" exception to the NLRB's preemptive authority over unfair labor practices arguably covered by section 7 or section 8 of the NLRA.

As a final matter, it should be noted that, as set forth below, the Sixth Circuit's construction of section 302 also fails to mesh properly with the provisions of the RICO statute. This further illustrates the impropriety of the Circuit court's construction of section 302 and the magnitude of the problem which may be created by a failure to rectify the lower courts' analysis. Therefore, Petitioners respectfully request that this Court accept this issue for appeal inasmuch that the Sixth Circuit has misapplied the intent of section 302 to the facts of this case.

II. A PLAINTIFF, WHEN FILING A CIVIL CLAIM FOR TREBLE DAMAGES UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO"), MUST PLEAD RICO VIOLATIONS WITH THE SPECIFICITY DEMANDED IN FED. R. CIV. P. 9(b) TO DEMONSTRATE A "PATTERN OF RACKETEERING ACTIVITY", AND, ALSO, THE RICO PLAINTIFF MUST ALLEGE MORE THAN ONE ONGOING "SCHEME" TO FULFILL RICO'S PATTERN OF RACKETEERING ACTIVITY REQUIREMENT.

The decision handed down in this case by the United States Court of Appeals, Sixth Circuit is a classic example of how the federal courts have ignored the proliferation of RICO actions which are often initiated with civil complaints that contain inadequate and sloppy allegations. The RICO Act requires that plaintiff plead two acts of racketeering activity to properly allege a pattern of racketeering activity. 18 U.S.C. § 1961(5). In this instance, litigation has been going on for well over two years and this matter has now been brought to this Court's attention by virtue of only one true RICO predicate allegation: that the Petititioner, Mercy-Memorial Hospital, through its attorneys, assisted an employee in writing one brief. A review of the Complaint attached hereto as Appendix E provides no other

information relevant to this appeal as it applies to a RICO action except for one conclusory paragraph which is glossed over in the Circuit court's opinion. Therefore, it is respectfully requested that this Court grant Petitioners' Writ of Certiorari in relation to the issue of whether a RICO plaintiff is required to plead with particularity those allegations to support its RICO claim above and beyond conclusory paragraphs. In addition, there is the question of whether or not Respondents have appropriately pleaded a pattern of racketeering activity inasmuch that it has quantified only one scheme; i.e., decertification of the Union.[22]

A.

The Sixth Circuit's reading of Respondents' Complaint in this case led them to the conclusion that Respondents properly pleaded "two predicate acts of bribery as separate and independent wrongs." *Hospital Employees' Division of Local 79* v. *Mercy-Memorial Hospital*, 862 F.2d 606, 609 (1988). The court's interpretation of the complaint is inappropriate and its ultimate holding creates a conflict among the circuits regarding pleading requirements in a RICO action.

There is a consensus among the circuits which clearly illustrates that a RICO plaintiff must set forth allegations of a RICO violation with sufficient specificity so as to place the party being sued on notice of the issues involved in the suit. *Formax, Inc.* v. *Hostert*, 841 F.2d 388 (Fed. Cir. 1988); *New England Data Services, Inc.* v. *Becher*, 829 F.2d 286 (1st Cir. 1987); *Ray* v. *Karris*, 780 F.2d 636 (7th Cir. 1985); *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5 (2nd Cir. 1983); *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982); *Haroco* v. *American National Bank*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Basically, these

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[22] The long awaited question of what constitutes a pattern of racketeering activity is now before this Court through the case of *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

courts are in agreement that a plaintiff must comply with the specific pleading requirements of Fed. R. Civ. F. 9(b).[23]

Of the cases cited above, *New England Data Services, Inc.* v. *Becher* stands in st`rk contrast to the decision of the Sixth Circuit in this matter. In *Becher,* the plaintiff's complaint alleged:

> On information and belief, in effecting the stock sale agreement, the grant of the security interest, in purporting to exercise remedies to enforce said security interest, and in furtherance of the fraudulent scheme, defendants on two or more occasions used the mails and/or transmitted communications by wire in interstate or foreign commerce . . .

This paragraph was the essence of defendant's alleged racketeering activity as defined in 18 U.S.C. § 1961(1)(B). The question before the First Circuit was whether or not plaintiff had properly pleaded the RICO allegations of mail and wire fraud.

The court, acknowledging an earlier decision in *Wayne Investment, Inc.* v. *Gulf Oil Corp.*, 739 F.2d 11 (1st Cir. 1984), noted that RICO allegations based upon "information and belief" generally will not satisfy the particularity requirement of Rule 9(b) unless a complaint sets forth the facts for which the belief is founded. *Becher,* 829 F.2d at 288. In *Becher*, the court held that the complaint did not satisfy Rule 9(b) because the plaintiffs merely stated "conclusory allegations of mail and wire fraud [ ] with no description of any time, place or content of the communication." *Id.*, at 292.

The case at bar is in direct conflict with the rationale and holding of the *Becher* case and the other cases cited above. The Sixth Circuit looked to paragraphs 48 and 34 of Respondents' Complaint as the requisite two predicate acts constituting a pattern of racketeering. *Mercy-Memorial*, 862 F.2d at 607-608.

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[23] It is true that these cases involve RICO actions grounded on mail or wire fraud as the requisite predicate acts. To differentiate between the "fraud" cases and other general RICO actions, however, would be unwieldy, unjust and would add to the current confusion surrounding the RICO cause of action. *Becher*, 829 F.2d at 291.

Paragraphs 48 and 49 provide some factual support for the allegation that Mercy-Memorial allegedly assisted Susan Dorsey in her efforts to decertify Local 79. Specifically, paragraph 49 points out that "assistance included, but was not limited to, the writing of a legal brief." On the other hand, paragraph 34 simply states that "on information and belief, Mercy-Memorial provided financial assistance and/or other things of value to Nolan Smallwood in support of his efforts to decertify Local 79." There is absolutely no other factual background or pleading to lend support to this statement. Respondents' entire RICO action is premised on one alleged known fact: a brief was allegedly provided to Susan Dorsey in 1985 *after* she filed her own decertification petition. The vehicle for the second RICO predicate is the conclusory allegation at paragraph 34 which contains no basis in fact regarding what Petitioners did in relation to the decertification petition filed by Nolan Smallwood in 1983.

Not only did the Sixth Circuit accept these conclusory paragraphs as two predicate acts, the court accepted them specifically as two predicate acts of bribery and as separate and independent wrongs. *Mercy-Memorial,* 862 F.2d at 609. The ramifications of accepting paragraph 34 as both a RICO predicate act and as an act of bribery are two-fold. First, it allows the Respondents to maintain a RICO action for which there is no basis through a means of inadequate pleading. Second, the court assumes that the conclusory allegation made by Respondents are acts of bribery which are needed in order to maintain the section 302 claim against the Hospital.[24] If Respondents could not describe conduct which was potentially violative of section 302, obviously the RICO claim would fail. As Petitioners cannot adequately discern what those specific acts are that they were alleged to have committed, it is unreasonable to allow Respondents' Complaint to stand as having alleged the requisite predicate acts. Therefore, the Sixth Circuit's decision was erroneous in allowing every inference to be given to the Respondents. Clearly, the inferences which may

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[24] Whether Respondents even properly pleaded a section 302 violation is discussed in Argument I, *supra.*

legitimately be drawn from these particular paragraphs do not show that acts of bribery[25] were committed which would be necessary for Respondents to maintain their RICO claim. As the Sixth Circuit Court of Appeals' decision clearly conflicts with holdings among the other various circuits, Petitioners respectfully request that this Court also accept Petitioners' Writ of Certiorari as to this issue.

B.

Respondents' Complaint is further deficient inasmuch that it alleges only one "scheme"; the attempted decertification of Local 79. What constitutes a pattern of racketeering activity has generated a colossal number of lower court decisions and has been the subject of a good number of publications. The question of what constitutes a pattern of racketeering activity has now become so confused that this Court has accepted a petition for writ of certiorari in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988). In *Northwestern Bell*, this Court is now being asked to define exactly what is meant by RICO's pattern of racketeering activity requirement.

There is no need to reiterate the points raised in *Northwestern Bell* in his Brief. This Court is aware that basically three major approaches have now emerged in the lower courts. The most restricted view holds that a pattern is demonstrated only if the defendant's predicate acts occur in multiple and separate criminal schemes or episodes. These rulings have emerged from the Eighth Circuit and are subject of the *Northwestern Bell* appeal. *See Superior Oil Co.* v. *Fulmer*, 785 F.2d 252 (8th Cir. 1986). In addition, other appellate courts have set forth a variety of factors which taken together contribute to the finding of a pattern. This multi-factor approach often involves a court's attempt to steer a middle course between the two extreme views.

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[25] Petitioners assert that the complaint on its face contains absolutely no specific allegations of bribery.

See Morgan v. *Bank of Waukegan,* 804 F.2d 970 (7th Cir. 1986). Finally, a more liberal view has maintained the pre-*Sedima* course that two predicate acts alone are sufficient to constitute a pattern of racketeering activity. *See United States* v. *Ianniello,* 808 F.2d 184 (2nd Cir. 1986), *cert. denied,* 107 S. Ct. 3229 (1987); *R.A.G.S. Couture, Inc.* v. *Hyatt,* 774 F.2d 1350 (5th Cir. 1985).

The Sixth Circuit has not directly addressed what constitutes a pattern in a civil RICO sense until this matter. Instead, it has dealt with a discussion of the pattern requirement in connection with the prohibition against conspiring to violate RICO. *See United States* v. *Joseph,* 835 F.2d 1149 (6th Cir. 1987). In its opinion in this case, the Sixth Circuit cites no case law in support of its conclusion that Respondents properly pled two RICO instances as independent and separate predicate acts. The Court reasoned that the acts were separate in time and that the individual employees were different although the single general purpose was the same.

The Court of Appeals' holding is erroneous first for the reason stated in Argument II A, *supra,* as Respondents' conclusory allegations cannot sufficiently set forth more than one predicate act. Assuming, *arguendo*, that the Complaint should be accepted as well-pleaded allegations, this Court should still adopt a more restrictive approach of what constitutes a pattern of racketeering activity in view of the legislative history and the current RICO litigation abuse.

There is no question that the on-going conflict among virtually all of the various federal courts — and in this Court as well[26] — is grounded on the broadly worded RICO statute which has been liberally interpreted so as to allow a plethora of civil actions which certainly were not contemplated by the framers of the legislation. Petitioners contend that the emerging legal view is to

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[26] In this Court's first ruling regarding civil RICO, the Court was sharply divided regarding the application of RICO in civil matters. *Sedima, S.P.R.L.* v. *Imrex,* 423 U.S. 479 (1985).

re-examine RICO in view of its clearly documented legislative history.

Although the framers of RICO obviously wished to direct the Act's focus to organized crime, they could not overcome the question that there would be constitutional prohibitions against punishing only those members in the "Mafia". Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964,* 100 Harv. L. Rev. 1288, 1299 (1987) ("Congress was forced to make RICO as substantively broad as it did in part by its realization that a status-based statute would likely be unconstitutional."); *Sedima,* 473 U.S. at 525 (Powell, J., dissenting) (legislative history reveals that Congress did not state explicitly that the statute would reach only members of the "Mafia" because it believed there would be constitutional problems with establishing such a specific status offense). Thus, although the drafters of RICO intended a more narrow interpretation of the statute's language, Congress nonetheless drafted the statute broadly to not only avoid constitutional questions, but also to prevent those involved in organized crime from escaping criminal liability due to defects in the evidence-gathering process which is necessary to bring criminal sanctions against those engaged in organized crime. Note, *Clarifying a "Pattern" of Confusion: A Multi-Factor approach to Civil RICO's Pattern Requirement,* 86 Mich. L. Rev. 1745, 1764 (1988). Therefore, even though the language of the statute is broadly worded, this does not necessarily require that the statute should be interpreted as expansively as some courts have done in the past. The language of the statute really has no plain meaning.

The plain meaning rule is usually invoked in situations where statutory language is unambiguous. *Caminetti* v. *United States,* 242 U.S. 470 (1917). Given the present disagreement over the language of section 1961(5) among the circuits, it is necessary to seek additional rules of statutory construction. As this Court noted in *United States* v. *Turkett,* 452 U.S. 576, 580 (1981), the construction of a statute and its language, "if unambiguous, must be regarded as conclusive 'in the absence of a clearly expressed

legislative intent to the contrary.'" Thus, as pointed out by Justice Powell in his dissent in *Sedima*, the focus of whether or not the statute's requisite pattern of racketeering activity should be restricted can best be answered by a review of the legislative history.

Justice Powell notes that organized crime was clearly Congress' target by virtue of the Act's title and the legislative history of RICO requires such an interpretation. *Sedima,* 473 U.S. at 525. Further, commentators are beginning to agree that the legislative history behind RICO mandates a more restrictive approach to RICO civil actions, particularly in relation to what constitutes a pattern of racketeering activity. *See* Note, *Clarifying a "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 Mich. L. Rev. 1745 (1988); Note, *Civil RICO is a Misnomer: The Need for Criminal Procedure Protections and Actions Under 18 U.S.C. § 1964,* 100 Harv. L. Rev. 1288 (1987); Note, *The Pattern Requirement in Civil RICO is Working: Case Law After Sedima*, 33 Vill. L. Rev. 205 (1988).

Although there is some dispute as to what exact type of behavior Congress wished to proscribe, it seems clear through the legislative records that the lawmakers were concerned with attacking the economic base of structured and organized crime. S. Rep. No. 617, 91st Cong., 1st. Sess. 2 (1969). To that end, a criminal forfeiture provision was added which would compel the forfeiture of assets used in connection with or derived from criminal enterprises. As pointed out in the Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 70-92 (1985) [hereinafter the ABA Report], RICO's extension beyond "structured criminal enterprises was intended to be incidental." *Id.,* Note 70 at 24.

Having targeted those with some connection to organized crime, Congress debated the question of predicate violations. This Court is well acquainted with the Senate Judiciary Committee's Report whose language also appears in the now famous footnote 14 in *Sedima*:

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided . . . largely because the net would be too large and the remedies just proportionate to the gravity of the offense. The target of Title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective.

The Senate Committee thus appears to be in step with the determination that the infiltration of legitimate business by organized crime is the purpose of the RICO statute and that more than one scheme is necessary to comply with the statute's requirements. The ABA Report also concurs in this view, as it notes that "the 'pattern element of the statute was designed to limit its application to planned, on-going, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes.' " ABA Report at 72.

A reading of Respondents' Complaint clearly shows that the activity described therein is not that type of activity that the framers of the RICO statute intended to prevent. Plaintiff has pled no pattern of racketeering activity but in essence makes reference to one instance of brief writing during a decertification petition which was initially begun by an employee of the Hospital, independent of any influence or help from management or its attorneys. This type of behavior can hardly be construed as the kind of racketeering activity contemplated by Congress.

As the Circuit court erroneously reinstated this action based on the conclusory allegations of Respondents, it has likewise imposed a liberal reading of what constitutes a pattern of racketeering activity. Petitioners therefore respectfully request that this Court accept this issue and provide a ruling consistent with it expected decision of *H.J. Inc.* v. *Northwestern Bell Telephone Co., supra.*

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CONCLUSION

As the decision of the Court of Appeals for the Sixth Circuit raises a conflict among the circuits regarding the two issues discussed above, and further raises important questions regarding federal law in the area of preemption and RICO, the Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully Submitted,

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DATED: March 6, 1989

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MERCY-MEMORIAL HOSPITAL CORPORATION and
RICHARD HILTZ,
Petitioners,

v.

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, et al,
Respondents.

APPENDIX

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APPENDIX A

No. 88-1041
UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO et al.,
Plaintiffs-Appellants,

v.

MERCY-MEMORIAL HOSPITAL CORPORATION, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed December 6, 1988

Before: MERRITT, MARTIN and MILBURN, Circuit Judges.

MERRITT, Circuit Judge. The parties present two issues on appeal. First, whether a cause of action alleging management bribery of a union employee under section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186 (making it illegal for an "employer to pay . . . any money or other thing of value . . . to any employee . . . in excess of [his] normal compensation for the purpose of causing such employee . . . to influence any other employees in the exercise of the right to organize and bargain collectively"), is "preempted" by a section 8 NLRB unfair labor practice proceeding under the National Labor Relations Act, 29 U.S.C. § 158. Second, whether the Union as plaintiff has sufficiently alleged in its complaint two predicate offenses to support a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 161, *et seq.*

Appendix A

Hospital Employees v. Mercy-Memorial *No. 88-1041*

The District Court dismissed the Union's section 302 claim under Fed. R. Civ. P. 12(b)(1). The court concluded that the Union attempted to circumvent the exclusive jurisdiction of the NLRB by bringing this section 302 action alleging management payments to employees to rid the company of the Union. The District Court dismissed the Union's RICO claim under Fed. R. Civ. P. 12(b)(6), holding that the predicate acts as alleged were committed during the course of a *single scheme* and did not constitute a "pattern" of racketeering.

The plaintiffs-appellants are a labor union, Hospital Division of Local 79 of the Service Employees International Union, AFL-CIO, and some of its members. Local 79 is the certified exclusive bargaining representative of the employees of the defendant-appellee Mercy-Memorial Hospital, a privately owned, non-profit hospital in Monroe, Michigan. Defendant Richard Hiltz is the administrator of Mercy.

In September 1985, Susan Dorsey, an employee of Mercy, filed a decertification petition that the Union now alleges was the result of illegal payments made by Mercy in violation of section 302 of LMRA. The Union filed a complaint with the NLRB, alleging that Mercy violated section 8(a)(1) of the NLRA by providing more than "ministerial aid" to a decertification petitioner. The NLRB investigated the complaint. In his summary report, the Regional Director, in the exercise of prosecutorial discretion, concluded that the section 8(a)(1) charge should not be brought because Mercy and its attorneys did not improperly interfere with or restrain the employees in the free exercise of their labor rights. The Director believed that the employees had already freely decided to seek a decertification election and that any aid given by Mercy's lawyers to Dorsey in the form of assistance in the brief writing process would not interefere with the employees' free exercise of their section 7 rights. The NLRB's

Office of Appeals approved this dismissal at the end of December 1986.

On December 4, 1986, the Union filed the complaint in this case. Count I alleges that Mercy violated section 302(a)(3) of the Labor Management Relations Act, 29 U.S.C. § 186(a)(3); Counts II and III alleged violations of RICO, 18 U.S.C. § 1961, by virtue of two separate violations of LMRA; Count IV alleged tortious interference with economic relations, a claim which is not a subject of this appeal.

The Union alleges that Mercy "has provided and is providing financial assistance and/or other things of value to Susan Dorsey in excess of her normal compensation in support of her efforts to decertify Local 79." Plaintiffs' Complaint, paragraph 48. The Union also alleges that "Mercy-Memorial provided financial assistance and/or other things of value to Nolan Smallwood in support of his efforts to decertify Local 79." Plaintiffs' Complaint, paragraph 34. This last allegation refers to a decertification petition filed with the NLRB in January 1983 by Nolan Smallwood, an employee of Mercy. The Smallwood petition was allegedly filed two years before the Dorsey petition. The District Court agreed with Mercy in characterizing the allegations in the Union's complaint as claims of unfair labor practices, claims the court held were subject to the exclusive jurisdiction of the NLRB.

The fundamental flaw in the District Court's analysis is its application of the preemption doctrine to the facts of this case. Congress created the NLRB to administer the new regulatory structure established in the National Labor Relations Act. The federal scheme was designed to achieve uniformity in our national labor policy. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 (1985). The need for a centralized administrative agency to enforce the Act was seen as crucial to

achieving the desired national uniformity. 359 U.S. at 242. The Supreme Court fashioned a special preemption doctrine to protect the centralization of administration envisioned by Congress. In *Garmon,* the Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act [NLRA], the *States* as well as the federal court, must defer to the exclusive competence of the National Labor Relations Board *if the danger of state interference* with national policy is to be averted." *Id.* at 245 (emphasis added). The *Garmon* and other doctrines are not designed to preempt other independent rights created by Congress, and we find no case authority holding that the doctrine preempts section 302.

Preemption is not a problem in the present case because section 302 is an independent liability-creating statute enacted by Congress to provide additional judicial remedies for certain wrongful conduct. *See Lingle v. Norge Div. of Magic Chef, Inc.,* __ U.S. __, 108 S.Ct. 1877, 1884 (1988) (claims "based on rights arising out of a [federal] statute designed to provide minimum substantive guarantees to individual workers" are normally characterized as independent and not preempted by other federal labor statutes). For more comprehensive descriptions of the four preemption doctrines developed by the federal courts in the labor field, *see McCall v. Chesapeake & Ohio Ry. Co.,* 844 F.2d 294, 299-301 (6th Cir. 1988); *Jones v. Truck Drivers Local Union No. 299,* 838 F.2d 856, 868-75 (6th Cir. 1988); Cox, *Recent Developments in Federal Labor Law Preemption,* 41 Ohio St. L.J. 277 (1980). Both section 302 of LMRA and section 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy. Section 8 is a general provision. In section 302 Congress has independently provided a judicial remedy for certain specifically described conduct. Using *Garmon* preemption against section 302 actions would effectively repeal section 302 because the conduct proscribed by section 302 is almost always arguably

subject to sections 7 or 8 of the NLRA and, therefore, subject to the jurisdiction of the NLRB in an unfair labor practice proceeding. The preemption doctrine has no application to this case because Congress intended two separate but complimentary remedies. Count I of the Union's complaint is, therefore, remanded for further proceedings on the merits. We do not have before us any claim of res judicata or collateral estoppel and have no occasion to consider their application here.

The District Court also erred in its dismissal of the Union's RICO claims. The court held that the alleged racketeering activity occurred in the course of a single illegal scheme. Therefore, it concluded that a pattern of racketeering, which requires at least two predicate offenses, was not properly alleged. The court apparently saw the two separate allegations of attempts to decertify the Union through bribery, one by Smallwood in 1983, the second by Dorsey in 1985, as part of a single scheme by Mercy to finance attempts to decertify Local 79 as the collective bargaining agent of the hospital employees. This view is in error. The complaint alleges two predicate acts of bribery as separate and independent wrongs. The fact that an employer has one overall purpose to get rid of a union does not conflate all of its alleged wrongful acts over a long period of time into only one RICO event. The two acts as alleged are independent and constitute two separate predicate acts under RICO. The acts are separate in time. The individual employees are different. Although they may be part of a single general purpose, they do not arise from a single set of facts constituting one transaction. As alleged they are separate offenses under section 302 and must be held to constitute separate predicate offenses under RICO.

Accordingly, the judgment of the District Court is reversed and the case remanded for further proceedings.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; CHARLOTTE BAUM, NINFA BECKNER and STEPHEN MCHENRY, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

MERCY-MEMORIAL HOSPITAL CORPORATION and RICHARD HILTZ,
Defendants.

CASE NO. 86-CV-75066-DT

HONORABLE LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 11th day of December, 1987.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This cause is brought before the Court on Defendants' Motion for Accelerated Judgment. Defendants predicate this motion upon Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

An action will be dismissed pursuant to Rule 12(b)(1) only if there is no basis for federal jurisdiction. *Oppenheim v. Sterling,* 368 F.2d 576 (10th Cir. 1966). The test for determining jurisdiction on the face of the pleadings is whether the federal claim alleged is so patently without merit as to justify the district court's dismissal for want of jurisdiction. *Duke Power Company v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59 (1978).

The court's inquiry is limited to determining whether the challenged pleadings set forth allegations sufficient to show the court that it has subject matter jurisdiction over the matter. *Great Lakes Education Consultants v. Federal Emergency Management Agency,* 582 F.Supp. 193 (E.D. Mich. 1984). The pleadings are to be construed in a light most favorable to the party opposing the motion. If the pleader alleges facts sufficient to infer that proper subject matter jurisdiction exists, the motion must be denied. *Great Lakes Steel v. Deggendorf,* 716 F.2d 401 (6th Cir. 1983).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of the Plaintiffs' Complaint. *Davey v. Tomlinson,* 627 F.Supp. 1458, 1463 (E.D. Mich. 1986); *Hudson v. Johnson,* 619 F.Supp. 1539, 1542 (E.D. Mich. 1985). "In evaluating the propriety of a dismissal under Rule 12(b)(6), the factual allegations in the complaint must be treated as true." *Janan v. Trammell,* 785 F.2d 557, 558 (6th Cir. 1986); *Windsor v. The Tennessean,* 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied* ___ U.S. ___, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984). Plaintiffs' claims shall not be dismissed unless it is established that the Plaintiffs cannot prove beyond doubt any set of facts to support their claim that would entitle them to relief. *Janan,* 785 F.2d at 558.

I. ALLEGATIONS OF THE COMPLAINT

Plaintiffs Charlotte Baum, Ninfa Beckner and Stephen McHenry are employees of the Defendant Mercy-Memorial Hospital Corporation (Mercy-Memorial). Plaintiff Employees' Division of Local 79, Service Employees' International Union, AFL-CIO (Local 79), is a labor organization which represents certain employees (including the above named Plaintiffs) of the Defendant Mercy-Memorial. Defendant Mercy-Memorial is a nonprofit Michigan corporation that operates as a hospital. Defendant Richard Hiltz is Mercy-Memorial's administrator.

Appendix B

Plaintiffs' Complaint describes a history of recurrent labor disputes between Local 79 and Mercy-Memorial. The Complaint further alleges that Mercy-Memorial repeatedly violated State and Federal labor laws by refusing to bargain with Local 79. For purposes of this motion, all of Plaintiffs' allegations are accepted as true. Nonetheless, the overwhelming majority of facts alleged by Plaintiffs are irrelevant to their claims.[1] The relevant facts are recited below.

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[1] Plaintiffs' Complaint outlines a history of labor disputes. Specifically, Plaintiffs' Complaint alleges that Mercy-Memorial wrongfully refused to bargain from 1970 to 1980. During this ten year period, Plaintiffs' Complaint states that the Michigan Employment Relations Commission (MERC) found Mercy-Memorial in violation of M.C.L.A. §423.16(1),(6). MERC ordered Mercy-Memorial to bargain but they refused. The Michigan Court of Appeals affirmed the MERC order. Nonetheless, Mercy-Memorial refused to bargain. The Michigan Supreme Court denied Mercy-Memorial leave to appeal and ordered them to bargain. Regardless, Defendant refused. Subsequently, the NLRB found Mercy-Memorial's continued refusal to bargain to be in bad faith and in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. §158(a)(5). Mercy-Memorial refused to comply with the NLRB order to bargain. The Sixth Circuit affirmed the NLRB order and in turn, ordered Mercy-Memorial to bargain in good faith. *NLRB v. Mercy-Memorial Hospital Corp.*, 575 F.2d 1196 (6th Cir. 1978). Shortly thereafter, Mercy-Memorial began to bargain with Local 79.

A collective bargaining agreement was finally reached in 1980. That agreement expired in 1982. A second collective bargaining agreement was reached which extended through 1985. Mercy-Memorial refused to bargain following expiration of the second collective bargaining agreement. On October 27, 1986, the NLRB found Mercy-Memorial's refusal to bargain to be in bad faith and in violation of Section 8(a)(5) of the NLRA. Nonetheless, Mercy-Memorial refused to bargain.

This descriptive account of the labor disputes between the parties is of no assistance to Plaintiffs' claims. Counts I, II, and III of the Complaint turn on whether there was a violation of, or the commission of some act indictable under 29 U.S.C. §186(a)(3). Specifically, Plaintiffs must allege some facts which show that Mercy-Memorial did "... pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —(3) to any employee ... for the purpose of causing such employee ... directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing." 29 U.S.C. §186(a)(3). None of the allegations outlined above substantiate Plaintffs' claim that Defendants' conduct was indictable under, or in violation of, 29 U.S.C. §186(a)(3).

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On January 20, 1983, Nolan Smallwood, an employee of Mercy-Memorial, filed a petition with the NLRB that sought to decertify Local 79. Plaintiffs allege that "Mercy-Memorial provided financial assistance and/or other things of value to Nolan Smallwood in support of his efforts to decertify Local 79." Plaintiffs' Complaint, paragraph 34. On September 30, 1985, Susan Dorsey, an employee of Mercy-Memorial, filed a petition with the NLRB seeking to decertify Local 79. Plaintiffs' Complaint, paragraph 37. Plaintiffs further allege that Mercy-Memorial, through the law firm Keller, Thoma, Schwarze, Schwarze, Dubay and Katz, P.C., "has provided and is providing financial assistance and/or other things of value to Susan Dorsey in excess of her normal compensation in support of her efforts to decertify Local 79." Plaintiffs' Complaint, paragraph 48. Plaintiffs claim Mercy-Memorial's actions were intended to cause Susan Dorsey to influence other employees in the exercise of the right to organize and bargain collectively through representation of their own choosing.

Plaintiffs' four-count Complaint relies upon the above stated facts. Count I alleges a claim under Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. 186. Counts II and III allege claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961, *et seq.* Count IV alleges a claim for tortious interference with economic relations.

Similarly, Count IV alleges tortious interference with a prospective business relation. Plaintiffs' prospective business relation is between Local 79 and Defendants' employees. None of the facts alleged in Plaintiffs' historical narrative contribute to Count IV of Plaintiffs' Complaint. Thus, the Court finds the overwhelming majority of Plaintiffs' Complaint to be irrelevant. Those facts that are relevant to Plaintiffs' claims are outlined in the main text of this opinion.

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II. APPLICABLE LAW

(A) Count I: Violations of 29 U.S.C. §186(a)(3)

The Plaintiffs contend that the Defendant/Employer influenced its employees to file petitions with the National Labor Relation Board seeking the decertification of the Plaintiff/Union as their exclusive bargaining agent. Plaintiffs assert that the Defendants, through their agents, law firm, and others acting on their behalf, provided certain employees with money and other things of value, including legal services. Plaintiffs conclude that these things of value were provided in excess of the employees normal compensation and thus, constituted violations of Section 302(a)(3) of the LMRA, 29 U.S.C. 186(a)(3).

The Defendants respond that the allegations set forth by Plaintiffs are simply claims of unfair labor practice and are subject to the exclusive jurisdiction of the National Labor Relations Board (NLRB). By attempting to bring this claim of unfair labor practice under the guise of a criminal statute[2] Plaintiffs are attempting to circumvent the NLRB's exclusive jurisdiction.

This Court agrees.

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[2] This Court shares with other courts a concern over whether Congress intended Section 302(a)(3) to provide civil remedies. *e.g. Local 355, Hotel, Motel, Rest. & Hi-Rise v. Pier 66 Co.*, 599 F.Supp. 761, 764 (S.D. Fla. 1984). Section 302(e) provides in part:

> [t]he district courts of the United States . . . shall have jurisdiction, for cause shown . . . to restrain violations of this section.

Interestingly, courts which have found jurisdiction within the injunctive provisions of Section 302(e) have generally done so only to enjoin activity related to Section 302(c). Case law is virtually silent on the issue of whether Section 302(e) injunctive relief is available to prohibit violations of Section(a)(3). Most of the courts addressing the issue have found that Section 302(a)(3) provides only criminal penalties for violations of its provisions. *Pier 66* at 764 *citing Alvares v. Erickson*, 514 F.2d 156 (9th Cir. 1975) *cert denied* 423 U.S. 874 (1975); *Oil Chemical and Automic Workers Union v. Chevron*, Case No. C82-512V (W.D. Wash., January 13, 1983); *but see Butchers' Union, Local 498 v. S.D.C. Investment, Inc.*, 631 F. Supp. 1001 (E.D. Cal. 1986).

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In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959), the Supreme Court held that "[w]hen an activity is arguably subject to §7 or §8 of the [NLRA] . . . the federal courts must defer to the exclusive confidence of the National Labor Relations Board . . . ." The Supreme Court has subsequently recognized certain exceptions to the *Garmon* preemption doctrine. Thus, Count I will be preempted by the jurisdiction of the NLRB only upon a finding that it states a claim arguably subject to §7 or §8 of the NLRA and that it is not within a recognized exception to the *Garmon* preemption doctrine.

Section 8(a) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(a) provides, in part, that:

> "[i]t shall be an unfair labor practice for an employer
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

29 U.S.C. §157 provides, in part, that:

> "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

The purpose of Section 8(a)(1) is to "establish the employee right to organize themselves for their mutual aid and to do so without interference from employers." *Local 355, Hotel, Motel, Rest. & Hi-Rise v. Pier 66 Co.,* 599 F.Supp. 761 (S.D. Fla. 1984) *citing Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793 (1945). It is well settled that when an employer initiates a decertification proceeding, and promotes a decertification proceeding by threat, coercion or bribery, that employer has committed an unfair labor practice. *cf. N.L.R.B. v. State Plating & Finishing Co.,* 738 F.2d 733 (6th Cir. 1984).

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In the instant case, Plaintiffs allege that Defendants promoted a decertification drive by providing certain employees with things of value. Plaintiffs also allege that Defendants intended to interfere with their employees right to bargain collectively through representatives of their own choosing.

After careful review of the statutory language and purpose of Section 8 of the NLRA, and the allegations contained in Count I, the Court finds that Count I arguably states a claim under §8 of the NLRA.

Having so held, Count I will be preempted by the jurisdiction of the NLRB unless it falls within an exception to the *Garmon* preemption doctrine. Plaintiffs argue that since Count I is brought under a different statutory scheme, the unfair labor practice claim must be found to be collateral to the issue of whether Defendants violated Section 302. Plaintiffs conclude that labor law issues which arise as collateral issues in suits brought under independent federal statutes are excepted from the *Garmon* preemption doctrine. *Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).

This Court is unpersuaded that Count I falls within the *Connell* exception.

In *Connell*, the Supreme Court noted that a claim will be excepted from the preemption doctrine when the independent federal remedy is consistent with the NLRA. *Id.* at 636, n.17. In the instant case, the federal remedy available under Section 302 is contrary to the policy of the NLRA. The purpose of the NLRA is to encourage peaceful resolution of labor disputes without resort to the courts. *e.g. Kellogg Co. v. Int'l Printing Pressmen & Assoc. Union of North Am.,* 410 F.Supp. 207 (W.D. Mich. 1976). By allowing Plaintiffs to pursue this claim this Court would create a means whereby parties to a labor dispute could resort to the courts without first attempting a peaceful resolution through the administrative process. Such a finding would be in direct contra-

vention of our national labor policy. Similarly, in *Vaca v. Sipes, supra,* the Court recognized:

> that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies .... *Id.* at 180.

The *Vaca* Court went on to note that the primary justification for the preemption doctrine is:

> the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose. *Id.* at 180-181.

Applying these policies to the case at bar the court finds that Count I must be preempted by the jurisdiction of the NLRB. To find otherwise would not only allow parties to labor disputes to avoid the administrative process, *supra,* it would also create a means of circumventing unfavorable decisions by the NLRB regarding its unfair labor practice claims. Such a result would likely result in conflicting rules of substantive law in the area of labor relations. This Court, therefore, will preserve national labor policy and find Plaintiffs' claim under Section 302(a)(3) preempted by the jurisdiction of the NLRB.

(B) Counts II and III: The RICO Claims

Counts II and III of Plaintiffs' Complaint allege a civil claim undr the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1961, *et seq.* To state a claim under RICO the Plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, thereby causing injury to the Plaintiffs' business or property. *Sedima S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985). Defendants argue that Plaintiffs have failed to properly allege a pattern of racketeering activity.

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Plaintiffs' Complaint alleges that Defendant Richard Hiltz has conducted Mercy-Memorial's labor relations in violation of State and Federal labor laws. Plaintiffs further claim that Richard Hiltz and Mercy-Memorial have provided money and/or other things of value to two separate employees for the purpose of filing two separate petitions for union decertification at two separate times. Plaintiffs claim the above-mentioned conduct resulted in multiple violations of Section 302(a)(3) of the LMRA.

In *Sedima*, the Supreme Court invited courts to develop rigorous standards for what constitutes a pattern of racketeering activity:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," §1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong.Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the

> isolated offender); House Hearings at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. *Iannelli v. United States*, 420 U.S. 770, 789, 95 S.Ct. 1284, 1295, 43 L.ed. 616 (1975).

Sedima, 105 S.Ct. at 3285 n.14. An overwhelming majority of courts have since been reviewing the RICO pattern requirement with greater scrutiny.

Some courts have interpreted the pattern requirement more narrowly than others. The Eighth Circuit has held that a pattern of racketeering activity does not exist where several acts of racketeering activity are performed in furtherance of a single illegal scheme. *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). The Eighth Circuit reasoned that a single illegal scheme cannot, as matter of law, display the requisite degree of "continuity plus relationship" to form a pattern or racketeering activity. Generally, the trend in this district has been to follow the Eight Circuit's view. *In re Evening News Assoc. Tender Offer Litigation*, 642 F.Supp. 860 (E.D. Mich. 1986); *McIntyre's Mini Computer Sales Group, Inc. v. Creative Syneray Corp.*, 644 F.Supp. 580 (E.D. Mich. 1986); *Zahra v. Charles*, 639 F.Supp. 1405 (E.D. Mich. 1986).

Conversely, other courts have not interpreted the *Sedima* dictum as narrowly as the Eighth Circuit. The Seventh Circuit has held that a pattern of racketeering activity may be established even where the illegal activity is in furtherance of a single scheme. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986). Under this view, the Court must review RICO claims case by case and determine whether the alleged illegal conduct dem-

onstrates a sufficient degree of "continuity plus relationship" to establish a pattern of racketeering activity. The Sixth Circuit is silent on the issue.

This Court is inclined to follow the trend established in this district and accept the Eighth Circuit's interpretation of a pattern of racketeering activity. Therefore the Court holds that when the alleged racketeering activity occurs in the course of a single illegal scheme, a pattern of racketeering activity is not established. This holding is consistent with Congress' intent to exclude isolated criminal conduct from RICO liability.

Applied to this case, Plaintiffs' Complaint reflects an elaborate history of state and labor law violations. However, unfair labor practices and bad faith refusals to bargain are not activities that are statutorily defined as racketeering activity under RICO.[3] When stripped of its irrelevant allegations Plaintiffs' Complaint alleges but a single wrongdoing; namely, the financing of attempts to decertify Local 79 as the collective bargaining agent of the hospital employees. The attempts to decertify Local 79 constitute a single illegal scheme. Plaintiffs have failed to allege a pattern of racketeering activity and thus, Plaintiffs' claims under civil RICO must fail. Accordingly, Defendants' Motion to Dismiss Counts II and III is GRANTED.

(C) Count IV: Tortious Interference with an Economic Relation

Count IV alleges a state law claim of tortious interference. Defendants contend that Count IV is preempted by federal labor laws.

This Court agrees.

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[3] Racketeering activity is specifically defined at 18 U.S.C. §1961(1). Racketeering activity includes any act or threat involving any one of eight enumerated state law offenses, or any act indictable under any one of thirty-four enumerated federal statutory offenses.

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As previously stated in this Opinion, a claim that alleges conduct arguably subject to §7 or §8 of the NLRA will be preempted by the jurisdiction of the NLRB unless the claim is found to be within a limited class of exceptions to the preemption doctrine. *Supra* p. 4-7.

In the instant case, Plaintiffs' Complaint alleges that Defendants' decertification efforts tortiously interfered with the union's economic relation with its members. Decertification efforts have traditionally been found to be in violation of Section 8 of the NLRA. *See NLRB v. Proler Intern. Corp.*, 635 F.2d 351 (5th Cir. 1981); *NLRB v. Midwest Hanger Co. and Liberty Engineering Corp.*, 474 F.2d 1155, *cert. denied* 414 U.S. 823 (1973). As such, Count IV is nothing more than a claim of unfair labor practice in violation of Section 8 of the NLRA, disguised as a state law tort claim.

The Court further finds that Count IV is not exempt from the preemptive force of the NLRA. The exercise of state jurisdiction over this claim would create a risk of interference with the regulatory jurisdiction of the NLRB.

Count IV complains of conduct arguably subject to Section 8 of the NLRA. Further, Plaintiffs have failed to convince this Court that its claim should be excepted from the general preemption doctrine. Defendants' Motion to Dismiss Count IV is, therefore, GRANTED.

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III. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss as to Counts I, II, III and IV of the Complaint. There being no other claims remaining in this suit, this case is dismissed.

IT IS SO ORDERED.

(s) LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; CHARLOTTE BAUM, NINFA BECKNER and STEPHEN MCHENRY, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

MERCY-MEMORIAL HOSPITAL CORPORATION and RICHARD HILTZ,
Defendants.

CASE NO. 86-CV-75066-DT

HONORABLE LAWRENCE P. ZATKOFF

JUDGMENT

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated December 11, 1987.

Dated at Detroit, Michigan, this 11th day of December 1987.

ROBERT A. MOSSING
CLERK OF THE COURT
BY: (s)
DEPUTY CLERK

APPROVED:
(s) LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership

therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention

of membership therein; or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into an agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect on inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods,

or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from

the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a

written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as

requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and contruction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor

organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section : *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice,

once given, may be extended by the written agreement of both parties.

§ 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Appendix C

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business;

(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection

by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the priviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice. *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers

or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.[1]

(d) Penalty for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a

felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28[2] (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

Appendix C

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instru-

ments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or secton 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or intstrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter.

Appendix C

Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enter-

prise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 § 1963 Note 167

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 9162 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying

the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91–452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)

APPENDIX D

NATIONAL LABOR RELATIONS BOARD
REGION 7

Patrick V. McNamara Federal Building, Room 300
477 Michigan Avenue, Detroit, Michigan 48226

William Wertheimer, Esq.
1400 N. Park Plaza
17117 W. Nine Mile Road
Southfield, MI 48075

October 22, 1986

Re: Mercy-Memorial Hospital
Case No. 7-CA-25998

Dear Mr. Wertheimer:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are not warranted at this time. I am, therefore, refusing to issue Complaint. A written summary report of the basis for my conclusion is attached hereto.

Please refer to enclosed Form NLRB-4938 as to the procedure and deadline for filing an appeal of my dismissal action.

Very truly yours,

Bernard Gottfried
Regional Director

ED:mh
Enclosures
cc: David Kempner, Esq.
2900 Penobscot Building
Detroit, MI 48226

Michael Heller, Esq.
204 S. Macomb
Monroe, MI 48161

Appendix D

Re: Mercy Memorial Hospital Corporation
Case No. 7-CA-25998

SUMMARY REPORT

The charge in the above-captioned case was filed July 2, 1986, by the Charging Party Hospital Employees Division of Local 79, Service Employees Division of Local 79, Service Employees International Union, AFL-CIO, against the Employer, alleging that it violated Section 8(a)(1) of the Act by providing more than ministerial aid to a decertification petitioner.

The investigation disclosed that, on September 30, 1985, an employee (the Petitioner) filed a petition to decertify the Hospital Employees' Division of Local 79, SEIU (the Union) as the collective bargaining representative. On June 11, 1986,[1] the undersigned dismissed the petition because of a blocking charge filed by the Union. Both the Employer and the Petitioner filed Requests for Review of the decision to dismiss. The supporting briefs filed by their attorneys were so strikingly similar that the Union concluded that the Employer's attorney had in fact written both.

It is well settled that an employer may not solicit, support, or assist in the initiation, signing, or filing of an employee decertification petition. *Placke Toyota, Inc.*, 215 NLRB 395 (1974); *Dayton Blueprint Co.*, 193 NLRB 1100, 1107-08 (1971); *The Red Rock Co.*, 84 NLRB 521, 524-25 (1949), *enfd. as modified*, 187 F.2d 76 (5th Cir. 1951), *cert. denied*, 341 U.S. 950 (1951). Employer involvement in an employee-initiated decertification movement is not, however, per se unlawful. *Eastern States Optical Co.*, 275 NLRB No. 58 slip opinion at 4-7 (April 30, 1985). Thus, for example, the Board will not find a violation where the employer's conduct constitutes no more than "mere ministerial aid", *Consolidated Rebuilders, Inc.*, 171 NLRB 1415, 1417

[1] All subsequent dates are in 1986.

(1968), or where the employer is simply assisting employees in the realization of an independently arrived at decision, *Washington Street Foundry*, 268 NLRB 338, 339 (1983); *WTVC*, 126 NLRB 1054, 1057 (1960); *Hazen & Jaeger Funeral Home*, 95 NLRB 1034 (1951), *enfd.*, 203 F.2d 807 (9th Cir. 1953) or in "the expression of their predetermined objectives." *Eastern States Optical Co., supra*, at 7; *Poly Ultra Plastics*, 231 NLRB 787, 790 (1977). The test, ultimately, is whether the specific counduct at issue has "the tendency. . .to interfere with the free exercise of the rights guaranteed to employees under the Act." *Washington Street Foundry, supra*, at 339 (quoting from *Red Rock Co.*, 84 NLRB at 525).

In the instant case, I conclude that the Section 8(a)(1) charge should be dismissed, in that the conduct of the Employer and its attorney did not interfere with or restrain the employees in the free exercise of their Section 7 rights. It is undisputed that the employees prepared, circulated, signed, and filed the decertification petition without the Employer's interference. The Employer's apparent assistance, in the form of assistance from its attorney to the Petitioner's attorney, occurred after the employees had already freely decided to seek a decertification election. Thus, even assuming that the Employer's attorney dominated the brief-writing process, that conduct by itself would not tend to interfere with the employees' free exercise of their Section 7 rights. In fact, the brief writing process only involved the two parties' attorneys, and thus took place completely outside the sphere of employee knowledge and conduct. There is no evidence that the employees even knew of the alleged involvement of the Employer's attorney in the brief writing process. Moreover, since the Petitioner presumably supported her attorney's decision to request review of the dismissal, any assistance given by the Employer's attorney merely furthered the expression of that predetermined objective.

Accordingly, the instant Section 8 (a)(1) charge is hereby dismissed.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOSPITAL EMPLOYEES' DIVISION OF LOCAL 79, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO; CHARLOTTE BAUM, NINFA BECKNER and STEPHEN MCHENRY, on behalf of themselves and all others similarly situated,

Plaintiffs,

MERCY-MEMORIAL HOSPITAL CORPORATION and RICHARD HILTZ,

Defendants.

Case No.
Hon.

COMPLAINT

Hospital Employees' Division of Local 79, Service Employees International Union, AFL-CIO, ("Local 79"); Charlotte Baum, Ninfa Beckner and Stephen McHenry, on behalf of themselves and all other similarly situated, by their attorneys, Miller, Cohen, Martens & Ice, P.C., for their complaint against Mercy-Memorial Hospital Corporation ("Mercy-Memorial") and Richard Hiltz state:

NATURE OF THE ACTION

1. Mercy-Memorial has provided financial assistance to certain of its employees who are seeking to decertify local 79 as their bargaining representatives. It has in the process violated the Labor Management Relations Act of 1947 ("LMRA") and state law. Richard Hiltz, Mercy-Memorial's administrator, has violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") and state law.

Appendix E

THE PARTIES

2. Local 79 is a labor organization with offices at 2604 Fourth Street, Detroit, Michigan.

3. Local 79 represents a unit of all full and regular part-time dietary aides, dietary clerks, cooks/bakers, housekeeping aides, porters, machine operators, nurses aides, orderlies, ward clerks, pharmacy aides, x-ray aides, laboratory aides, central supply aides, physical therapy aides, general maintenance and maintenance mechanics, but excluding registered nurses, LPN's, GPN's, office-clerical employees, professional employees, technical employees, and supervisors employed at Mercy-Memorial.

4. Charlotte Baum is employed by Mercy-Memorial as a dietary aide. She is Local 79's chief steward. She resides in Temperance, Michigan.

5. Ninfa Beckner is employed by Mercy-Memorial as a central supply aide. She is a Local 79 steward. She resides in Monroe, Michigan.

6. Stephen McHenry is employed by Mercy-Memorial as general maintenance. He resides in Monroe, Michigan.

7. Mercy-Memorial is a non-profit Michigan corporation which operates a hospital at 718 N. Macomb, Monroe, Michigan.

8. Richard Hiltz is, and has been at all times relevant, Mercy-Memorial's administrator. He resides in South Monroe Township, Michigan.

JURISDICTION

9. The court has jurisdiction pursuant to Section 302(e) of LMRA, 29 U.S.C. § 186(e); RICO, 18 U.S.C. § 1964(c), and the doctrine of pendant jurisdiction.

Appendix E

CLASS ALLEGATIONS

10. Local 79 brings this action on behalf of itself and in its capacity as collective bargaining representative on behalf of all the employees in the unit described in paragraph 3.

11. Charlotte Baum, Ninfa Beckner and Stephen McHenry ("individual plaintiffs") bring this action on behalf of themselves and the class of all employees in the unit described in paragraph 3.

12. Persons who constitute the class are so numerous that joinder of all members is impracticable.

13. There are questions of law and fact common to the entire class.

14. The claims of the individual plaintiffs are typical of the claims of the entire class.

15. The individual plaintiffs will fairly and adequately protect the interests of the entire class.

16. This action meets the requirements for maintenance as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(1), (2) and (3).

17. Upon information and belief, no other member of the class has instituted a similar action.

STATEMENT OF FACTS

18. On 20 May 1970 the Michigan Employment Relations Commission ("MERC") conducted an election to determine whether the employees in the unit described in paragraph 3 desired to be represented by Local 79. A majority voted yes.

19. On 28 May 1970 MERC certified Local 79 as the bargaining representative of Mercy Hospital's (Mercy-Memorial's precedessor) employees.

20. After 15-19 bargaining sessions, Local 79 applied for a governor's special commission hearing pursuant to M.C.L.A. § 432.13a.

21. On 8 April 1971 the governor's commission issued a report. Local 79 stated it would accept the commission's recommendations. Mercy Hospital refused.

22. On 1 May 1972 Local 79 struck Mercy Hospital.

23. Shortly thereafter Mercy Hospital hired strike replacements. On 30 June 1972 Mercy Hospital notified Local 79 that it was refusing to bargain.

24. On 16 May 1973 MERC found that Mercy Memorial's refusal to bargain was in bad faith in violation of M.C.L.A. § 423.16(1) & (6). MERC ordered Mercy-Memorial to bargain. Mercy-Memorial refused in violation of state law.

25. On 15 March 1974 the Michigan Court of Appeals affirmed the MERC bargaining order. *Service Employees v. Monroe Mercy*, 52 Mich. App. 165 (1974). Mercy-Memorial continued to refuse to bargain.

26. On 12 June 1974 the Michigan Supreme Court denied leave to appeal. *Service Employees v. Monroe Mercy*, 391 Mich. 839 (1974). Mercy-Memorial continued to refuse to bargain.

27. On 26 July 1974 Congress amended the National Labor Relations Act ("NLRA") to provide for federal jurisdiction over non-profit hospitals, with the amendments becoming effective 25 August 1974. 29 U.S.C. § 152(2). Public Law 93-360, 93d Cong., S.3203, 88 Stat. 395 (1974).

28. On 27 September 1974 Mercy-Memorial filed a petition with the National Labor Relations Board ("NLRB") seeking to nullify the adjudications of MERC and the Michigan courts.

Appendix E

29. On 23 October 1975 the NLRB dismissed Mercy-Memorial's petition. *Mercy-Memorial Hospital Corp.*, 221 N.L.R.B. 1, 90 L.R.R.M. 1611 (1975).

30. On 24 May 1976 the NLRB found that Mercy-Memorial's continuing refusal to bargain was in bad faith in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5). The NLRB ordered Mercy-Memorial to bargain. *Mercy-Memorial Hospital Corp.*, 220 N.L.R.B. 51, 92 L.R.R.M. 1378 (1976). Mercy-Memorial refused in violation of federal law.

31. Mercy-Memorial combined its illegal refusal to bargain with a series of other unfair labor practices, including threatening employees and discriminating against strikers in violation of Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3). *Mercy-Memorial Hospital Corp.*, 231 N.L.R.B. 1108, 96 L.R.R.M. 1239 (1977).

32. On 8 June 1978 the Sixth Circuit ordered Mercy-Memorial to bargain. *NLRB v. Mercy-Memorial Hospital Corp.*, 575 F.2d 1196 (6th Cir. 1978). Mercy-Memorial did so.

33. In 1980 Mercy-Memorial and Local 79 entered into a collective bargaining agreement effective through 31 December 1982.

34. On 20 January 1983 Nolan Smallwood, a unit employee, filed a petition at the NLRB seeking to decertify Local 79. *Mercy-Memorial Hospital*, Case No. 7-RD-1977. On information and belief, Mercy-Memorial provided financial assistance and/or other things of value to Nolan Smallwood in support of his efforts to decertify Local 79.

35. On 9 March 1983 the NLRB conducted a representation election. Local 79 won. Mercy-Memorial filed objections to the election. On 24 May 1983 an NLRB hearing officer issued a report and recommended that Mercy-Memorial's objections be overruled. Mercy-Memorial filed exceptions with the NLRB.

Appendix E

36. In June 1983 Mercy-Memorial and Local 79 entered into a second collective bargaining agreement effective through 31 December 1985.

37. On 30 September 1985 Susan Dorsey, a unit employee, filed a petition at the NLRB seeking to decertify Local 79. *Mercy-Memorial Hospital,* Case No. 7-RD-2229. The NLRB held in abeyance the processing of this petition, pending its disposition of the first decertification petition.

38. On 21 April 1986 the NLRB issued a decision and certification of representative rejecting Mercy-Memorial's exceptions to the 9 March 1983 election. *Mercy-Memorial Hospital,* 279 N.L.R.B. No. 56, 122 L.R.R.M. 1035 (1986).

39. Since May 1986 Mercy-Memorial has refused to bargain in violation of federal law.

40. On 30 May 1986 Local 79 filed a charge at the NLRB alleging that the refusal to bargain was in violation of Section 8(a)(5) of the NLRA.

41. On 9 June 1986 the Regional Director of the NLRB's Detroit office issued a complaint against Mercy-Memorial alleging that the refusal to bargain was in violation of Section 8(a)(5) of the NLRA.

42. On 11 June 1986 the Regional Director dismissed the decertification petition in Case No. 7-RD-2229 subject to reinstatement upon final disposition of the allegations contained in the complaint described in paragraph 41. Both Mercy-Memorial and Susan Dorsey filed with the NLRB requests to review this dismissal along with briefs in support. They are pending.

43. On 27 October 1986 the NLRB issued both a decision finding that Mercy-Memorial's refusal to bargain was in bad faith in violation of Section 8(a)(5) of the NLRA and an order requiring Mercy-Memorial to bargain with Local 79. *Mercy-*

Memorial Hospital Corp., 282 N.L.R.B. No. 5, __ L.R.R.M. __ (1986).

44. Mercy-Memorial is continuing to refuse to bargain in violation of federal law.

COUNT ONE - LMRA

45. Plaintiffs adopt by reference paragraphs 1-44.

46. Mercy-Memorial is an employer in an industry affecting commerce.

47. Keller, Thoma, Schwartz, Schwartz, Dubay & Katz, P.C., ("Keller-Thoma") acts as a labor relations expert, advisor or consultant to Mercy-Memorial and has represented Mercy-Memorial in all the legal matters described herein.

48. Mercy-Memorial, through its agents Keller-Thoma and others, has provided and is providing financial assistance and/or other things of value to Susan Dorsey in excess of her normal compensation in support of her efforts to decertify Local 79.

49. This assistance includes, but is not limited to, the writing of legal briefs, including but not limited to the brief described in paragraph 42, providing legal advice and other like acts.

50. Mercy-Memorial engaged in the acts described in paragraph 45 through 49, for the purpose of causing Susan Dorsey to influence other employees in the exercise of the right to organize and bargain collectively through representation of their own choosing.

51. Mercy-Memorial, by the acts described in paragraphs 45 through 50, has violated Section 302(a)(3) of LRMA, 29 U.S.C. § 186(a)(3).

WHEREFORE, plaintiffs request the court:

A. restrain the above described violations of the LMRA;

B. award plaintiffs their costs and attorney fees; and

C. grant plaintiffs such other relief as is just.

COUNT TWO - RICO

52. Plaintiffs adopt by reference paragraphs 1-51.

53. Richard Hiltz is a "person" within the meaning of 18 U.S.C. § 1961(3).

54. Mercy-Memorial is an "enterprise" within the meaning of 18 U.S.C. § 1961(4).

55. Mercy-Memorial is an enterprise engaged in, or whose activities affect, interstate commerce.

56. Since 1970 Richard Hiltz has conducted Mercy-Memorial's labor relations by violating state and federal labor laws, including Section 302 of LMRA, 29 U.S.C. § 186, to denigrate Local 79, reduce labor costs and enrich Mercy-Memorial and Richard Hiltz.

57. Mercy-Memorial's acts, described in paragraphs 45 through 51, constitute multiple violations of Section 302 of LMRA, and are part of a pattern of violating state and federal labor laws described above.

58. Pursuant to 18 U.S.C. § 1961(1)(C), violations of Section 302 of LMRA are RICO predicate offenses.

59. Each of these multiple violations of Section 302 of LMRA constitutes an instance of "racketeering activity" within the meaning of 18 U.S.C. § 1961(1).

60. Mercy-Memorial's multiple acts of racketeering activity constitute a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5).

61. By reason of the events and circumstances described herein, Richard Hiltz unlawfully conducted the labor relations

affairs of Mercy-Memorial through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

62. Local 79 and the individual plaintiffs have been injured in their business or property by reason of these violations of 18 U.S.C. § 1962(c). Local 79 has had to expend substantial sums to defend against the decertification campaign supported by Mercy-Memorial. The individual plaintiffs have been deprived of the benefits Local 79 would have been able to negotiate for them had Richard Hiltz not engaged in this activity.

WHEREFORE, plaintiffs request judgment against Richard Hiltz as follows:

A. an award, pursuant to 18 U.S.C. § 1964(c), of three times the damages plaintiffs suffered;

B. an award of punitive damages;

C. an award of costs and attorney fees; and

D. for such other relief as is just.

COUNT THREE - RICO CONSPIRACY

63. Plaintiffs adopt by reference paragraphs 1-62.

64. By reason of the aforesaid circumstances and events, Richard Hiltz, Keller-Thoma and others knowingly conspired and agreed together and with each other to conduct and participate in the conduct of Mercy-Memorial's labor relations affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d).

65. Local 79 and the individual plaintiffs have been injured in their business or property by reason of these violations of 18 U.S.C. § 1962(d). Local 79 has had to expend substantial sums to defend against the above described decertification campaign. The individuals plaintiffs have been deprived of the benefits Local

79 would have been able to negotiate for them had Richard Hiltz not engaged in this activity.

WHEREFORE, plaintiffs request judgment against Richard Hiltz as follows:

A. an award, pursuant to 18 U.S.C. § 1964(c), of three times the damages plaintiffs suffered;

B. an award of punitive damages;

C. an award of costs and attorney fees; and

D. for such other relief as is just.

COUNT FOUR - INTERFERENCE WITH ECONOMIC RELATIONS

66. Plaintiffs adopt by reference paragraphs 1-65.

67. Local 79 and its members have a business relationship in that Local 79 provides services to its members in exchange for dues.

68. Defendants had knowledge of this relationship.

69. Defendants intentionally interfered with this relationship by providing assistance to the decertification petitioners as described above.

70. As a result of this interference, certain former members of Local 79 terminated their memberships.

71. Local 79 and its members and former members have been damaged by the disruption of these relationships.

WHEREFORE, plaintiffs request judgment against defendants as follows:

A. an award of damages, both compensatory and exemplary;

B. an award of punitive damages;

C. an award of costs and attorney fees; and

D. for such other relief as is just.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial an all issues triable by jury.

Respectfully submitted,

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